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No. _____

In The

Supreme Court of the United States

October Term, 1988

PATRICIA COTTON, on behalf of herself and all others similarly situated,

Petitioners,

v.

PATRICK BABCOCK, in his capacity as Director of the Michigan Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in finding, contrary to the decisions of this Court and five other circuits, that the eleventh amendment bars a federal court from ordering a state official to return improperly denied food stamp coupons to their rightful recipients, even though 7 U.S.C. § 2020(e)(11) and 7 U.S.C. § 2023(b) require such restoration, and no state funds are used to pay for the coupons.

2. Whether Congress has abrogated a state's eleventh amendment immunity in 7 U.S.C. § 2020(e)(11) and 7 U.S.C. § 2023(b) to the extent that it has explicitly required a state to pay part of the costs of releasing federally funded food stamp coupons that are found to have been wrongfully withheld.

3. Whether *Hans v. Louisiana,* 134 U.S. 1 (1890), should be reversed in order to restore a plain reading of the eleventh amendment so as to prohibit only those actions brought against a state by citizens of another state.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Patricia Cotton, on behalf of herself and all others similarly situated in Michigan, and Agnes Mansour, in her capacity as Director of the Michigan Department of Social Services. Respondent Patrick Babcock has succeeded Agnes Mansour as Director.

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v.

PATRICK BABCOCK, in his capacity as Director of the Michigan Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Patricia Cotton, on behalf of herself and all other persons similarly situated, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on December 1, 1988, and its order denying rehearing *en banc* entered on March 20, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, is reported at 863 F.2d 1241 (6th Cir. 1988), and is reprinted in the attached Appendix B, (App. 2). The order of the Court of Appeals for the Sixth Circuit on Petitioner's Motion for Rehearing En Banc was issued on March 20, 1989 has not been reported (App. 3). The opinion of the District Court for the Eastern District of Michigan (Newblatt, D.J.) is reported at 634 F. Supp. 1094 (E.D. Mich. 1986). It is reprinted in Appendix A (App. 1).

JURISDICTION

The petitioners brought this suit under 42 U.S.C. § 1983 in the Eastern District of Michigan. On April 11, 1986 the District Court for the Eastern District of Michigan issued an opinion granting petitioners' motion for summary judgment. The parties entered a stipulation and order for class certification on June 17, 1986. Judgment was entered on July 29, 1986. (App. 45).

Respondent appealed to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. On December 1, 1988, the court entered a judgment reversing the decision of the lower court. *See* Appendix B. Petitioner filed a Petition for Rehearing *En Banc*, which was referred to the original panel. On March 20, 1989, the panel issued an order denying Petitioners' Petition for Rehearing. This petition was filed within 90 days of that order.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. Amend. XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States.

7 U.S.C. § 2020(e)(11)

The State plan . . . shall provide . . .

[u]pon receipt of a request from a household, for the prompt restoration in the form of coupons to a household of any allotment or portion thereof which has been wrongfully denied or terminated, except that allotments shall not be restored for any period of time more than one year prior to the date the State agency receives a request for such restoration from a household or the State agency is notified or otherwise discovers that a loss to a household has occurred;. . . .

7 U.S.C. § 2023(b)

[I]n any judicial action arising under this Act [7 U.S.C.S. 2011 *et seq.*], any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a

request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

7 C.F.R. § 273.17(a), (b), (c). The full text of this regulation is set forth in Appendix D. (App. 4).

STATEMENT OF THE CASE

I. THE FOOD STAMP PROGRAM

A. The Structure of Funding

The Food Stamp Act was passed in 1964 for the dual purpose of providing nutrition to low income persons and increasing the domestic market for agricultural surpluses. Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. § 201 (1982)). It is a federal program that is administered by the Food and Nutrition Service of the United States Department of Agriculture (USDA). 7 C.F.R. § 271.3 (1988).

If a state participates in the food stamp program, the federal government provides books of printed coupons ("stamps") for the state to store and distribute to eligible households. 7 C.F.R. § 274.4(a), (e) (1988). The households use the coupons to pay for food. The food provider then turns in the coupons for payment by any federally insured financial institution, which in turn receives reimbursement from the Federal Reserve Banks. 7 U.S.C. § 2019 (Supp. V 1987); 7 C.F.R. § 278.5 (1988). The coupons are an obligation of the United States. 7 U.S.C. § 2024(d) (1982); 7 C.F.R. § 271.5 (1988). *See generally*

Pennsylvania Department of Public Welfare v. USDA, 781 F.2d 334 (3rd Cir. 1986).

If a state participates in the food stamp program, the state must comply with the federal food stamp laws and regulations. It also agrees to incur fifty percent of certain administrative costs associated with distributing the food stamps. 7 U.S.C. § 2019 (Supp. V. 1987); 7 C.F.R. § Pt.277 (1988). The state is never responsible for paying the actual costs of food stamps since they are paid entirely by the Federal Reserve Banks.

The Michigan Department of Social Services (MDSS) is the agency that administers the food stamp program in Michigan. The defendant in this case is the Director of MDSS.

2. Framework for Restoration of Improperly Denied Benefits

The Food Stamp Act of 1977 imposes specific statutory duties on a state agency that learns that it has failed to provide eligible persons with all the food stamp coupons to which they are entitled.

Regardless of how the underissuance is caused, the federal government pays for the printing and redemption of the restored food stamp coupons. The state is merely obligated to pass through the coupons to the households who were entitled to them. Federal courts have universally held that wrongfully denied food stamps must be paid out of the federal, not the state, treasury even if the state was wholly responsible for the wrongful denial. *See,*

e.g., Bermudez v. USDA, 490 F.2d 718 (D.C.Cir. 1973); *Stewart v. Butz*, 358 F. Supp. 1345 (W.D. Ky. 1973), *aff'd*, 491 F.2d 165 (6th Cir. 1974). In *Stewart*, the Sixth Circuit held that although the state would be responsible for part of the administrative costs associated with restoring improperly withheld food stamps, the federal government would have to pay for the actual benefits. *See also, Carter v. Butz*, 479 F.2d 1084 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1103 (1973). There has been no dispute in this case that the coupons sought by plaintiffs will be provided and paid by the federal government.

According to the Food Stamp Act, whenever a state agency "discovers that a loss to a household has occurred," the state agency must automatically provide for "the prompt restoration" of the food stamps for a period of not more than "one year prior to the date that the state agency receives a request for restoration by the affected household, or the date the agency otherwise learns of the loss." 7 U.S.C. § 2020(e)(11) (1982).

The conference committee reports accompanying the above provision show that Congress intended states to automatically notify households of their right to receive the withheld benefits:

> The conferees, however, intend that State agencies be required to notify households of known improper denials as soon after discovery as possible and that households be told of the proper form for making a request for restoration of lost benefits.

H.R. Conf. Rep. No. 377, 97th Cong., 1st Sess. 221, *reprinted in part* 1981 U.S. Code Cong. & Admin. News 2250, 2318.

The federal food stamp regulations specifically prescribe the duties of the state agency whenever the state agency discovers that it has incorrectly denied or reduced benefits. In these circumstances, if the state agency does not restore the coupons on its own, and the household must initiate litigation, the Food Stamp Act, 7 U.S.C. § 2023(b) (1982) provides that:

> "[i]n *any* judicial action arising under [the Food Stamp Act], any food stamp allotments found to have been wrongfully withheld *shall be restored* . . . ."

(emphasis added.) The only qualification is that coupons may be restored for only up to "one year prior to the date of the commencement of such action, or . . . not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household." 7 U.S.C. § 2023(b) (1982).

The above statutory and regulatory provisions establish ongoing, affirmative duties on the part of any state agency that participates in the food stamp program. The agency must automatically pass through the food stamp coupons that were withheld from eligible households, regardless of whether the agency discovers the loss from the recipients, its own investigation, litigation, or otherwise.

II. PETITIONER'S FACTS

Plaintiff Patricia Cotton represents a class of food stamp recipients who were denied food stamp coupons in 1984 due to MDSS' method of budgeting certain supplemental payments issued under the Aid to Families with

Dependent Children (AFDC) or General Assistance Programs. These supplements were usually issued to reflect an increase in a family's needs that could not be included in its public assistance grant for the month when the need first arose. Supplements would be issued, for example, to reflect the birth of a new child, or increased rent.

Prior to May 1, 1984, MDSS had not counted these one-time supplemental payments as income because they were usually issued after the regular monthly assistance grant. Instead, it had treated them as nonrecurring lump sum "resources." In the food stamp program, such lump sums may not be counted as income when calculating a family's food stamps. 7 U.S.C. § 2014(d)(8) (Supp. V. 1987); 7 C.F.R. § 273.9(c)(9) (formerly at 7 C.F.R. § 273.9(c)(8) (1988). Changes in AFDC law eventually made it possible for MDSS to issue supplements in the same month when the family's needs increased. These expedited supplements were called "corrective payments." *See*, 42 U.S.C. § 602(a)(14)(B) (Supp. IV. 1986). The Secretary of the USDA promulgated a regulation requiring state agencies to budget these expedited "corrective" payments as income when calculating food stamps. 7 C.F.R. § 273.21(j)(1)(vii)(B) (1988).

On May 1, 1984, MDSS began to treat all supplemental payments as countable income for food stamp purposes whether or not they were actually corrective payments that were received in the same month as they were first needed. As a result of defendant's new method of budgeting all nonrecurring supplements, plaintiff class members did not receive all the food stamp coupons to which they were entitled.

In late August 1984, MDSS was notified by the USDA's Food and Nutrition Service that its interpretation of the new corrective payment regulation was incorrect. That memo directed all states to count as income "only the portion of such corrective payments intended for the month in which it is received." Any amount "restored for prior months is disregarded as a nonrecurring lump sum payment regardless of the source of the payment." FNS Food Stamp Policy Memorandum 84-37 (Aug. 13, 1984).

Despite its admitted receipt of this instruction, defendant took no steps to restore the food stamps that had been improperly denied to plaintiffs since May 1, 1984. Moreover, defendant did not bring Michigan's food stamp policy into compliance with FNS memorandum 84-37 until three months later, on December 1, 1984.

Patricia Cotton is a single mother who received AFDC in 1984. She did not receive an allowance for rent in her AFDC grant for February 1984 because her landlord had failed to turn in the necessary verification until March 1984. She finally received a supplemental payment for her February rent in May 1984. Although this supplement was a one-time lump sum restored for a prior month, defendant counted the supplement as income for food stamp purposes. As a result, Ms. Cotton was denied food stamp coupons to which she was entitled.

Ms. Cotton filed this litigation to enforce the Director's duty to restore the benefits it had learned were improperly denied to her and to others similarly situated. Defendant disputed plaintiffs' claim that its policy was erroneous prior to receiving the FNS memoranda. Defendant denied that its delay in implementing the policy was

unlawful. Defendant claimed that the eleventh amendment prevented the court from ordering it to release the coupons it had denied to class members from May until December 1984.

The District Court for the Eastern District of Michigan declared that defendant's policy had been unlawful and ordered defendant to "take administrative steps to restore" the coupons lost by plaintiffs including sending the notices required by 7 C.F.R. § 273.17 (1988).

Defendant appealed to the Sixth Circuit Court of Appeals which reversed the district court's decision. *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988). Plaintiff's request for rehearing *en banc* was denied, but was referred back to the original panel, who issued an order denying plaintiff's request for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION BELOW CONFLICTS WITH THE SETTLED ELEVENTH AMENDMENT DOCTRINE OF THIS COURT AS WELL AS DECISIONS IN THE FIRST, SECOND, THIRD, SIXTH, EIGHTH AND TENTH CIRCUITS BY BARRING RELIEF THAT WILL NOT BE PAID WITH STATE FUNDS.

Historically, this Court has invoked the eleventh amendment as a bar to relief in federal court against a state official only if the relief would result in the payment of an accrued monetary liability, i.e., benefits or damages, to plaintiffs from the state treasury. For example, in *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), this Court held that

a federal court could not order a state to pay plaintiffs retroactive Aid to the Aged, Blind and Disabled (AABD) benefits because such benefits were equivalent to damages that would in part be paid directly out of the state treasury:

> [The] retroactive award of monetary relief . . . is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Since *Edelman*, this Court has limited its application of the eleventh amendment to situations where the damages or retroactive benefits involved will themselves be paid out of the state treasury, (e.g. AABD benefits, Aid to Families with Dependent Children (AFDC) benefits, and medicaid benefits). This Court has, also, permitted a federal court to prospectively enjoin a state official from violating federal law even if the state incurs costs ancillary to this permissible relief. *Ex Parte Young*, 209 U.S. 123 (1908). For example, a federal court may order a state official to pay the cost of notifying all class members of their right to seek possible retroactive benefits through the state's administrative processes. *Quern v. Jordan*, 440 U.S. 332 (1979). Or the court can order the state officials to take steps to conform with ongoing requirements of federal law, despite a substantial impact on the state treasury in doing so. *Milliken v. Bradley*, 433 U.S. 289 (1977).

The district court below recognized that by ordering the Director of Michigan Department of Social Services to

take the administrative steps necessary to restore the class members' food stamps, it was merely prospectively enforcing the mandates of 7 U.S.C. § 2020(e)(11) (1982), 7 U.S.C. § 2023(b) (1982), and 7 C.F.R. § 273.17 (1988) which require the state agency to automatically restore the coupons that it had learned were improperly withheld. Any costs of compliance were deemed merely ancillary to the court's award of the principal relief, i.e. the coupons. The principal relief was not the property of the state and could not be satisfied with state funds. On appeal, however, the court of appeals adopted a view of the eleventh amendment that ignores how food stamp coupons are funded. The court of appeals' holding also ignores the fact that plaintiffs are permitted to sue under 42 U.S.C. § 1983 (1982) to prospectively enforce the state's statutory duties to automatically restore coupons that are improperly withheld.

If the court of appeals decision is left unreviewed then it will undermine the clear mandate of the United States Congress that states not be permitted to ignore their federal obligations in the food stamp program with impunity. It will conflict with the prior precedents of this Court, as well as an overwhelming majority of Circuit Courts of Appeals decisions, that authorize a court to order a state official to prospectively comply with federal law, even if the state *indirectly* incurs costs solely as a result of its compliance. Without reversal, state officials will be able to refuse to release or pass through non-state benefits or funds such as food stamp coupons despite a federal mandate to the contrary.

The court of appeals in the present case erred because it incorrectly treated the food stamp program as

indistinguishable from the AFDC program. It therefore mistakenly relied on this Court's holding in the AFDC case of *Green v. Mansour*, 474 U.S. 64 (1985), rather than undertaking an analysis of the fundamental differences present in these two distinct federal programs.

In *Green*, this Court held that if a state official cannot be prospectively enjoined from an ongoing violation of federal AFDC law, then a federal court may not award either declaratory relief or the notices authorized by *Quern*. This Court reasoned in *Green* that such relief was barred by the eleventh amendment because it would "have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the eleventh amendment." *Green*, 474 U.S. at 73. The relief sought by plaintiffs in *Green* was denied because its natural consequence would have been to require the state to pay the restored AFDC benefits themselves out of state funds.

Although this Court also mentioned a *per curiam* food stamp decision by the Second Circuit, *Colbeth v. O'Rourke*, 707 F.2d 57 (2nd Cir. 1983) in support of its decision in *Green*, 474 U.S. at 376, the separate funding structure and statutory provisions of the food stamp program were not directly before the Court. This Court has yet to squarely consider whether the eleventh amendment prohibits a federal court from ordering a state to pass through food stamp coupons that were wrongfully withheld when the coupons will be redeemed exclusively with federal funds.

The reliance by the court of appeals below on *Green*, without separate consideration of the food stamp program conflicts not only with the precedent of this Court,

but also with decisions by Courts of Appeals in five judicial circuits. These cases have held that federal courts may order a state official to pass through wrongfully withheld food stamps even if there is no current, ongoing violation of federal law. These other courts have held that relief that is identical to that sought by Plaintiffs in this case is not barred by the eleventh amendment. They reached this conclusion either because the "monetary loss caused by the breach of a legal duty", i.e. the food stamps, will be paid entirely out of the federal banks rather than with state funds, or because the Food Stamp Act *itself* specifically requires such relief. *See, e.g., Lynch v. Lyng*, (No. 88-5533), slip op. at 10-11 (6th Cir. Apr. 7, 1989); *Robinson v. Block*, 869 F.2d 202, 214, n.11 (3rd Cir. 1989) ("Inasmuch as the food stamp program is federally funded, the eleventh amendment is not a bar to . . . retroactive benefits."); *Klaips v. Bergland*, 715 F.2d 477, 484 (10th Cir. 1983) (since 7 U.S.C. §§ 2020(e)(11) and 2023(b) require restoration of lost benefits, states and courts must do so). *Foggs v. Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds sub nom.; Atkins v. Parker*, 472 U.S. 115 (1985); *Metzer v. Lyng*, 687 F. Supp. 454, 460 (D. Minn. 1987), ("[T]he Food Stamp Act itself specifically authorizes lump sum awards of retroactive benefits for a prior period of up to one year, whether the finding of an underpayment is made by the agency, 7 U.S.C. § 2020(e)(11), or as the result of a court decision. 7 U.S.C. § 2023(b).") *aff'd*, 864 F.2d 75 (8th Cir. 1988); *Stout v. Coler*, No. 84C 20205, slip op. at 15-20 (N.D. Ill. June 2, 1987) ("the corpus of the judgment that the plaintiff seeks is against the federal defendant."); *Harrington v. Blum*, 483

F. Supp. 1015, 1021 (S.D.N.Y. 1979), (since federal government pays the cost of retroactive benefits there is no eleventh amendment bar); *aff'd* 639 F.2d 768 (2d Cir. 1980).

In two circuits, the Second and Sixth Circuits, there is now a split between the panels considering the issue in this case. Following its decision in the present case, the Sixth Circuit ordered a state official to restore wrongfully withheld food stamps even though the plaintiffs sought only retroactive relief due to the defendants' failure to implement section 1504 of the Food Security Act of 1985, Pub.L. No. 99-198, 99 Stat. 134 on its effective date. *Lynch v. Lyng*, No. 88-5533, slip op. at 10-11 (6th Cir. 1989). There was no ongoing failure to implement the law, only the question of whether plaintiffs should have received more food stamps in the past. The Court ordered that the benefits must be restored. *Lynch* and the present case are simply irreconcilable.

The Second Circuit presents the other conflict. In *Colbeth v. Wilson*, 554 F. Supp. 539 (D.Vt. 1983), *aff'd per curiam sub nom., Colbeth v. O'Rourke*, 707 F.2d 57 (2ndCir. 1983), the district court found that although the federal government would pay for the retroactive food stamps, the defendant's "projections as to the magnitude of administrative expenses" associated with restoring these benefits posed the threat that such an award might "significantly interfere with the State's budgetary process . . . ". *Id., Colbeth*, 554 F. Supp. at 545. *But see, Harrington v. Blum*, 483 F. Supp. 1015 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2nd Cir. 1980).

The court of appeals below in the present case relied on *Colbeth* when it reversed the district court. However, the deciding factor in *Colbeth* was magnitude of the state's claimed costs. In the present case, by contrast, the defendant failed to show to the satisfaction of the trier of fact that its share of any administrative costs would be a burden. *Cotton*, 634 F. Supp. at 1094. Therefore, although *Colbeth* is more properly viewed as an incorrect application of the eleventh amendment to the Food Stamp Program, the present case is distinguishable on this factual basis alone.

The Court of Appeals decision below also conflicts directly with several related lines of authority where federal courts have ordered a state officer to release or restore funds that do not belong to the state. Federal courts have deemed the state, in such cases, as having only a "ministerial" role. A court order to release the funds, even if it results in ancillary costs to the state, has been deemed to involve the state merely as the conduit for delivering outside funds, rather than as an infringement on the state's own treasury.

To date, the overwhelming majority of the circuits has concluded that a state cannot use the cloak of the eleventh amendment to excuse itself from its statutory duties to release such funds if it has wrongfully withheld them. *See*, e.g., *Almond v. Boyles*, 792 F.2d 451, 456 (4th Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987) (requiring state to repay employee and employer contributions from state retirement system); *Blake v. Kline*, 612 F.2d 718, 721-26 (3rd Cir.1979), (funds to be paid out of segregated school retirement fund); *cert. denied*, 447 U.S. 1121 (1980). *See*

also, Miller-Davis Co. v. Illinois State Toll Highway Authority, 567 F.2d 323, 327 (7th Cir. 1977) (funds to be paid out of segregated state highway fund).

In the unemployment insurance context, a majority of circuits has held that plaintiffs may sue a state in federal court for recovery of past unemployment benefits on the grounds that the state's unemployment compensation fund is a special, segregated fund composed of employer contributions as distinguished from the state's general revenues. *See, e.g., Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir.1981), *cert. denied*, 459 U.S. 1150 (1983), *overruled on other grounds, Wimberly v. Labor & Indus. Relations Comm.*, 479 U.S. 511 (1987); *New York Tel. Co. v. New York State Dep't. of Labor*, 434 F. Supp. 810, 824 (S.D.N.Y. 1977), *rev'd on other grounds*, 566 F.2d 388 (2nd Cir. 1977), *aff'd*, 440 U.S. 519 (1979); *See also, Bowen v. Hackett*, 387 F. Supp. 1212, 1220-23 (D.R.I. 1975).

There is currently before this Court a petition for certiorari seeking review of a decision in which the Tenth Circuit departed from this long-standing line of unemployment insurance cases. *Esparza v. Valdez*, 612 F. Supp. 241, *aff'd on other grounds*, 862 F.2d 788 (10th Cir. 1988) petition for cert. filed, 57 U.S.L.W. 3604 (U.S. Feb. 24, 1989) (No. 88-1432). The decision in *Esparza*, as well as the holding of the court below in the present case, demonstrates that despite this Court's longstanding view that the eleventh amendment does not bar relief that will not itself be paid with state funds, there is a real conflict among the Circuits that must be resolved by this Court.

The Court of Appeals decision in this case is also contrary to a line of recent cases where federal courts

have ordered state officials to pass through $50.00 per month of the child support funds that were collected on behalf of AFDC recipients but not paid. These lower courts have unanimously held that the eleventh amendment does not bar a federal court from ordering a state to pass through those child support funds that a state has wrongfully withheld from a custodial parent. The child support funds do not belong to, and are not paid by the state. A petition for certiorari has also been filed in this context. *See, Bennett v. White*, 671 F. Supp. 343, 349 (E.D. Pa. 1987), *aff'd sub nom., Bennett v. Forsyth*, 865 F.2d 1395, 1407, 1408 (3d Cir. 1989); petition for cert. filed, *sub nom. White v. Bennett*, 57 U.S.L.W. 3781 (U.S. May 11, 1989) (No. 88-1851). *See also, Beasley v. Harris*, 671 F. Supp. 911 (D. Conn.1987); *Mosley v. Bowen*, 703 F. Supp. 1288 (S.D. OH. 1989); *Wilcox v. Ives*, 676 F. Supp. 355 (D. Me. 1987), *aff'd*, No. 88-1371 (1st Cir. Dec. 20, 1988).

Unless the decision below is reversed by this Court, there will continue to be erroneous decisions on whether federal courts may order state officials to distribute or pass-through funds or coupons that they have illegally withheld even if the state does not itself own or pay the funds. Lower courts must not be permitted to treat benefits which do not arise from a state's treasury in the same manner as benefit programs funded directly by the state, because such a view extends the reach of the eleventh amendment far beyond any holding or rationale adopted by this Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED THE SIGNIFICANT QUESTION OF WHETHER CONGRESS PARTIALLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY IN 7 U.S.C. §§ 2020 (E)(11) AND 2023(B), A CONSTITUTIONAL ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Even if the eleventh amendment would otherwise bar relief, Congress may lawfully abrogate the state's immunity through language which is "express" and which will "leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Congress may abrogate the eleventh amendment pursuant to its enforcement powers under Section 5 of the fourteenth amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), or under the commerce clause of United States Constitution. *See United States v. Union Gas Co.*, 832 F.2d 1343 (3rd Cir. 1987), *cert. granted* 56 U.S.L.W. 3647 (U.S. Mar. 21, 1988) (No. 87-1241).

This Court has not yet considered whether Congress intended to partially abrogate the states' eleventh amendment immunity by its express requirement in the food stamp statute and legislative history that food stamp coupons must be restored in *any* judicial action where they are found to have been wrongfully denied. 7 U.S.C. § 2023(b)(1982). Since there had already been numerous federal court cases requiring the restoration of improperly denied food stamps when Congress reviewed and amended this language in 1981, it must be presumed that Congress knew that the provision had been and would continue to be applied to food stamp cases in federal

court. *Cannon v. University of Chicago*, 441 U.S. 667, 710-11 (1979). It must also be assumed that Congress intended that when states participate in the food stamp program, they would be required to pay their share of the costs of passing through any coupons that they learned were wrongfully denied to eligible recipients.

United States Courts of Appeals in at least two circuits have specifically cited 7 U.S.C. § 2020(e)(11) (1982) and 7 U.S.C. § 2023(b) (1982) in support of their decisions to issue declaratory relief and an award of retroactive food stamps, whether or not prospective injunctive relief is available. *See, e.g., Klaips v. Bergland*, 715 F.2d 484 (10th Cir. 1983); *Metzer v. Lyng*, 687 F. Supp. 454, 460, *aff'd*, 864 F.2d 75 (8th Cir. 1988).

Congress delineated the scope of a court's power to restore food stamp coupons, by limiting such relief to a period of up to one year prior to the time the state learns of its wrongful denial. Congress' decision to define the maximum extent of the state and federal governments' exposure leaves room for no other conclusion but that Congress intended for the state to pay its share of the administrative costs ancillary to any court order requiring it to pass through the improperly denied coupons. Even if the eleventh amendment could be extended so far as to prohibit a federal court from ordering a state official to release wrongfully withheld coupons, Congress has abrogated the state's immunity to the extent permitted by 7 U.S.C. § 2023(b). Thus, if a federal court finds that recipients lost food stamp coupons in violation of federal law, and if the federal court orders these coupons to be restored within the period allowed by 7 U.S.C. § 2023(b), the state food stamp agencies must comply with this

order, and must pay their statutory share of the costs that are ancillary to such compliance.

On Plaintiff's Motion for Rehearing, the original panel below held without explanation that plaintiffs were not entitled to enforce 7 U.S.C. § 2020(e)(11) which requires the state agency to automatically restore food stamps that were improperly denied to recipients. Inexplicably, the panel did not even discuss 7 U.S.C. § 2023(b) even though that provision spells out precisely the relief that Congress authorized a court to award against a state in any judicial action.

If this Court finds that the eleventh amendment does not bar the relief ordered by the district court, then this Court need not reach the question of abrogation. If, however, the Court finds that the state may invoke the eleventh amendment to bar an order requiring it to distribute the coupons provided and paid by the federal government, then this Court should consider the important question of whether Congress intended any such immunity to be abrogated to the extent allowed by 7 U.S.C. § 2020(e)(11) and 7 U.S.C. § 2023(b).

III. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT BAR SUITS BY CITIZENS OF A STATE AGAINST THE SAME STATE

Hans v. Louisiana, 134 U.S. 1 (1890) stands for the proposition that the Eleventh Amendment of the United States Constitution prohibits the citizens of a state from obtaining a judgment against their own state in a federal court. This decision was reached despite the fact that the

plain reading of the eleventh amendment would apply only to suits brought against a state by persons not a resident of that state. This decision was the direct outcome of this Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793). In that case, a citizen of South Carolina sued the State of Georgia in federal court on a state based cause of action. Suit was brought in federal court by a South Carolina merchant. *Chisholm* created a major constitutional controversy, which resulted in the passage of the eleventh amendment. The amendment was meant to prohibit suits based upon a state created cause of action brought by citizens of another state in federal court. It was not meant to interfere with federal question jurisdiction.

The Court has recently considered the issue of whether or not the eleventh amendment decision in *Hans v. Louisiana* is still adequate law. Currently Justices Brennan, Marshall, Blackmun, and Stevens have all voted in favor of the reversal of *Hans v. Louisiana*. See *Green v. Mansour*, 474 U.S. 64 (1985), *Atascadero Hospital v. Scanlon*, 474 U.S. 234 (1985), *Papasan v. Allain*, 478 U.S. 265 (1986). Justices Scalia and Kennedy have yet to participate in a decision based on whether or not *Hans v. Louisiana* should be reversed.

The holding in *Hans v. Louisiana* has resulted in the distortion of eleventh amendment law. Only with the fiction of *Ex Parte Young*, 209 U.S. 123 (1908) has current day jurisprudence been able to breathe any life at all into the fourteenth amendment or subsequent amendments to the United States Constitution. *Young* created the fiction that an action taken by a state official in violation of federal law violates the supremacy clause and therefore

constitutes an *ultra vires* act, which cannot be an action of the state. Under the guise of this fiction, state legislative acts have been held to be in violation of the supremacy clause. The fiction that the legislative enactment is not truly a state action is continued.

The fiction then had to be extended further in order to require compliance by the states with the fourteenth amendment. *Edelman v. Jordan* stands for the proposition that the eleventh amendment prevents suits only for retroactive judgments against a state and does not cover prospective judgments. (Wording supporting such a conclusion is not to be found in the text of the eleventh amendment.)

The jurisprudence that has developed around the eleventh amendment has been reviewed by Justice Brennan in his dissent in *Atascadero*. In that dissent, a review of the history of the adoption of the eleventh amendment calls into question the historical underpinnings of the *Hans* decision. A strict construction of the amendment would clearly require a reversal of *Hans*.

This Court should review the holding in *Hans*, either to enforce the original intent of the framers of the constitution and the subsequent historical analysis, or to uphold *Hans* and end continuing speculation regarding the viability of *Hans* in light of this Court's evolving doctrine of strict construction.

CONCLUSION

The food stamp program has been adopted in all fifty states. It imposes uniform standards on the participating states. This petition presents legal questions that are important to the national implementation and enforcement of those standards. It raises questions regarding the interrelationship between the eleventh amendment and the food stamp program that have never been addressed by this Court, and which were decided by the Sixth Circuit contrary to the prior eleventh amendment cases decided by this Court. There is a continuing split among the United States Courts of Appeals who have addressed the issues raised in this petition, demonstrating the urgent need for reversal of the decision below by this Court. For these reasons, plaintiffs respectfully request that this Honorable Court grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

PATRICIA COTTON, on behalf of herself and all other persons similarly situated,

Plaintiff,

NO: 85-CV-40068-FL

v.

AGNES M. MANSOUR, personally and in her official capacity as Director of the MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court are the parties' Cross Motions for Summary Judgment. Plaintiff, a recipient of Aid to Families with Dependent Children (AFDC) and food stamps under the Food Stamp Program, brought this action for declaratory and injunctive relief to enforce her entitlement to food stamps. More specifically, plaintiff requests a declaratory judgment holding that defendant's prior policy of calculation was unlawful, that defendant be ordered to provide plaintiff wrongfully-withheld food stamps and that defendant be ordered to issue notice of under-payment and notice of the administrative mechanisms through which claimant's eligibility will be calculated.

I *FACTS*

In early 1984, plaintiff moved into a new apartment and to receive her AFDC grant for shelter, she gave her landlord a shelter verification form which he failed to return to the Michigan Department of Social Services, (MDSS) until March 1984. Thus, plaintiff did not receive her February AFDC grant until May 1984. This was just the beginning of plaintiff's problems because when MDSC calculated plaintiff's July, 1984 food stamps allowance, it counted this retroactive shelter allowance as extra income thereby reducing her July food stamps allowance. Although her February rent was to be paid with this allowance, the MDSC considered it available for food. MDSS claimed its method of calculation was correct because it considered the shelter allowance to be a corrective payment under 7 C.F.R. 273.21(j)(1)(vii)(B).

The Food Stamp Act, 7 U.S.C. § 2011 *et seq.* was enacted by Congress to provide federal funds to "permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power . . . " Food stamps, as well as other welfare benefits, are a legal right and statutory entitlement. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Administration of food stamp programs is handled by a state agency of each state which participates in the program. 7 U.S.C. § 2020. In Michigan, MDSS administers the program and is bound by federal statute and regulations.

Food stamp eligibility is based on household income. 7 U.S.C. § 2012(e), 7 C. F. R. § 273.1(a). Certain income is exempt, 7 C.F.R. 273.9(c), and MDSS deducts a variety of expenses including shelter expenses. Food stamp allotment for a particular month is based on the remaining income of a month two months prior. Starting in 1981, the

federal government made changes requiring states to more promptly increase a family's AFDC grant when need increased, 42 U.S.C. § 202(a)(14)(B), so that by 1983 corrective payments could be issued in the same month needed. 48 F.R. § 4955. (Plaintiff's Ex. D). As a result, the Department of Agriculture amended food stamp regulations to that corrective payments were to be counted prospectively or retrospectively depending on what they were for. 7 C.F.R. § 273.21(j)(i)(vii)(B).[1]

A comment accompanying this regulation indicated that retroactive payments intended to meet the needs in one or more previous months must be excluded as income pursuant to 7 C.F.R. § 273.9(c)(8). A memorandum issued in August 1984 by the Food and Nutrition Service (FNS) reaffirmed this in that "amounts [AFDC benefits] restored for prior months is disregarded as a non-recurring lump-sum payment regardless of the source of the payment." (Def. Ex. A-1) Although this memorandum was issued in August, MDSS did not change its policy[2] until December 1984 nor did it notify food stamp recipients that they could request an administrative hearing. Defendant responded to plaintiff's written inquiry that it would not issue such a notice because:

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[1] Michigan counted payments retrospectively under a method which counted all supplemental checks when computing income.

[2] The MDSS had been counting such supplemental payments in food stamp budgets which resulted in a decrease of food stamps. Prior to this time (March, 1984), defendant had not counted such supplemental payments. (Def. Ex. A).

a) It believed its method of budgeting prior to August 1984 was authorized by FNS, and

b) It believed that the delay between August 28, 1984 and December 1, 1984 was a reasonable time for the state to change its policy to be consistent with the FNS memo.

II

Plaintiff contends that MDSS's method of budgeting corrective payments violated federal welfare laws both before and after the August 1984 memo[3] and seeks declaratory relief to "declare that defendant's method of budgeting . . . supplemental . . . payments violates 42 U.S.C. § 1983, the Food Stamp Act and the United States Constitution." (pl. Comp. ¶ 3). While it is true that when a state administers food stamps in a manner more restrictive than required by federal law that courts have not hesitated to grant declaratory relief, defendant argues that subject matter jurisdiction is lacking because there is no longer a case or controversy as required under Article III, Section 2, clause 1 of the United States Constitution or 28 U.S.C. § 2201. Defendant contends that to the extent that plaintiff requests prospective relief, that issue was moot prior to plaintiff's filing her suit on February 15, 1985 because the MDSS changed its policy on December 1, 1984 to budget non-recurring supplemental assistance payments in the manner sought to be compelled by plaintiff.

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[3] Defendant states that for purposes of this motion, plaintiff's general allegations may be taken as true.

The "case or controversy" requirement in Article III prevents federal courts from considering questions which have become moot. *St. Pierre v. United States*, 315 U.S. 41 (1943). As defendant points out, the United States Supreme Court in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) stated:

> To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . ' However, moot questions require no answer . . . Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.' . . .

Moreover, the "case of actual controversy" requirement in the Declaratory Judgment Act, 28 U.S.C. § 2201, is considered to be the same as that in Article III. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277 (1937).

To the extent that plaintiff seeks a declaratory judgment and any prospective injunctive relief as to defendant's food stamp allotment budget policies that portion of plaintiff's claims should be dismissed as moot. Plaintiff's claim for retroactive relief, however, is different.

III.

Plaintiff requests retroactive relief in the form of unissued food stamps and that defendant be required to notify class members whose stamps were wrongfully withheld. Defendant argues that the Court lacks jurisdiction because of the Eleventh Amendment. The Eleventh Amendment provides a restraint on federal courts exercising jurisdiction over suits brought by individuals

against states, including citizens of their own states.[4] *Hans v. Louisiana*, 134 U.S. 1 (1890). To the extent that state officials are sued (in their official capacities) for retrospective relief, they enjoy Eleventh Amendment protection unless there is an exception. Plaintiff contends that food stamps are entirely financed by federal funds through the United States Department of Agriculture (USDA) and that the only costs to be borne by the state are administrative for which it may not claim immunity.

A.

It is obvious that states cannot claim relief from a retroactive award of food stamps. In *Stewart v. Butz*, 356 F.Supp. 1345 (1973), *aff'd* 491 F.2d 165, the Sixth Circuit Court of Appeals held that the federal government, not the state, must pay for food stamps wrongfully withheld. The Court upheld the district court's opinion which used the Eleventh Amendment as a reason for holding the federal government liable for wrongfully withheld welfare benefits: "The necessity of 'cooperative federalism' in such welfare programs . . . precludes the exercise of the equitable powers of a federal district court to order

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[4] "[T]he rule has evolved that a suit by private parties seeking *to impose liability which must be paid from public funds* in the state treasury is barred by the *Eleventh Amendment.*" *Edelman v. Jordan*, 39 L.Ed.2d 662 (1974) (emphasis added). *See also Green v. Mansour*, No. 84-6270, slip op. at 4 (S.Ct. Dec.3, 1985) (Because of the Eleventh Amendment, states may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity.)

retroactive payments from state monies." *Id.* at 1352.[5] *See also Carter v. Butz*, 479 F.2d 1084 (3d Cir.), *cert. denied* 414 U.S. 1103a (1973) ("Under the [Food Stamp] Act . . . the Federal Government pays for benefits . . . while the state pays for a portion of administrative costs.);[6] *Harrington v. Blum*, 484 F.Supp. 1015 (1979) *aff'd* 639 F.2d 768 (2d Cir. 1980). (Because states may seek reimbursement from the USDA for retroactive benefits paid, states may be ordered

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[5] Defendant criticizes plaintiff's use of *Stewart* in that it never raised the issue of administrative costs and that it was decided prior to *Edelman, supra*. Though it is true that *Stewart* never reached the issue of administrative costs, it is not here cited for that issue. Moreover, *Stewart* is clearly consistent with *Edelman* which involved a program funded by both the federal and state governments so that the federal courts' remedial power, to be consistent with the Eleventh Amendment, would not allow a retroactive award which would require the payment of funds from the treasury. *Stewart* involved a wholly federally funded program.

[6] When considering whether to construe the act as permitting the implementation of a remedy against the state rather than federal government, we cannot disregard the fact that Congress has appropriated funds for the payment of the benefits . . . while the states have not. This is not to suggest that it would have been beyond the power of Congress to require as a condition of the state's participation in the program a waiver of sovereign immunity to the extent of retroactive benefits . . . But nothing in the Act suggests any such conditional intent.

Id. at 1088.

to arrange for the award of retroactive benefits);[7] and *Collins v. Marshall*, 507 F.Supp. 83 (W. D. Mo.), *rev'd on other grounds sub nom Collins v. Donovan*, 661 F.2d 705 F.2d 705 (8th Cir. 1981).

Thus, it is concluded that ordering the state to arrange for wrongfully withheld benefits will not, at least to the extent of the food stamps, violate the Eleventh Amendment. In fact, from a review of defendant's brief it appears that defendant has only raised the issue of whether she must provide notice to recipients of their entitlement to additional food stamps and the procedures through which they could process their claim. Moreover, it appears that defendant wrongfully withheld food stamps due to its policy of including supplemental payments from March 1, 1984 to December 1, 1984.

B.

Plaintiff argues that administrative costs associated with notice does not bar plaintiff from receiving retroactive food stamps because these costs are distinguishable from food stamps and the Eleventh Amendment is not

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[7] In fact, 7 C.F.R. § 271.1(q)(1)(1978) [now § 273.17] provides that retroactive benefits are to be given by the State in cases of administrative erros such as erroneous denials: '[d]enials include, but are not limited to, instances where a State agency has erroneously denied the application . . . ' Given this specific provision for payment of retroactive benefits, there is no reason to doubt that the State will be reimbursed for retroactive food stamp benefits.

Id. at 1021.

involved. Clearly, the administrative costs are distinguishable from food stamps. *See* above cited cases. *See also* 7 U.S.C. § 2020(e)(ii); 7 C.F.R. § 273.17(b). Moreover, the costs of arranging the retroactive payments does not involve the Eleventh Amendment.

Although the United States Supreme Court has not reached this issue directly, other Supreme Court opinions dealing with the general area and lower court opinions dealing witht the issue directly, indicate that costs of arranging for retroactive payments, which themselves are paid by the federal government, do not involve the Eleventh Amendment.

Various lower court opinions have held that administrative costs caused by a decison are not within the Eleventh Amendment's immunity for state defendants. In *Collins, supra,* the district court ordered that a recipient or a wholly federally funded unemployment insurance, state administered, program should be restored unemployment insurance funds improperly wihheld from them. In response to the state's contention that this was barred by the Eleventh Amendment, the court stated:

> The state defendants have carried out the regulation promulgated by the Secretary, in administering the recoupment of overpayment on the basis of the regulation . . . Any claims in this case for the amounts which have been recovered through this method are not barred by the Eleventh Amendment. Federal, not state, funding is essentially involved *Cf., Edelman v. Jordan,* 415 US. 651, 94 S.Ct. 1347, 39 L. Ed.2d 662 (1974). Any administrative cost indirectly caused by this ruling would not create an immunity for the

> state defendants. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979).

Id. at 86.[8]

Defendants point to the Second Circuit case of *Colbeth v. O'Rourke*, 707 F.2d 57 (2nd Cir. 1983) which affirmed a district court decision dealing with retroactive food stamp relief. The district court in *Colbeth v. Wilson*, 554 F.Supp. 539 (D. Vt. 1983), refused to order the state to issue a form of notice sanctioned in *Quern v. Jordan*, 440 U.S. 332 (1979), advising recipients of their possible eligibility for retroactive relief. Because of the magnitude of administrative expenses associated with the grant of retroactive relief, which would "demonstrably and significantly interfere with the State's budgetary process and thus its fiscal autonomy." *id.* at 545, the court concluded that the retroactive relief would be barred.

Moreover, the court held that a *Quern* notice was barred because defendant showed (and plaintiff conceded) that the issuance of the notice would be effectively burdensome to the defendant –

> due to the estimated size of the class, the fact that class members and present recipients of benefits are not necessarily one and the same group, and the probability that several forms of notice would likely have to be used.

Id. at 546.[9]

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[8] *See also Harrington, supra* and *Carter, supra.* Both cases were discussed above.

[9] The *Colbeth* court also noted that *Quern* was limited to prospective relief to which the notice was ancillary. This is found to be an artificial distinction and that the reasoning in

(Continued on following page)

Defendant, here does not indicate how the retroactive award of benefits or the notice relief would be effectively burdensome to the state.

Moreover, though defendant tries to distinguish it, *Quern, supra,* supports plaintiff's position. The issue in *Quern* was whether the federal court could order state officials to send an explanatory note to members of plaintiffs' class advising them of state administrative procedures available by which they could receive a determination of whether they were entitled to past benefits. The court stated:

> We think this relief falls on the *Ex Parte Young* side of the Eleventh Amendment rather than on the *Edelman* side . . . [Petitoner contends] that the proposed notice will lead . . . to the payment of state funds for retroactive benefits and therefore, it . . . amounts to a monetary award. But the chain of causation . . . is by no means unbroken; it contains numerous missing links, which can be supplied . . . only by the state and members of plaintiff claim and not by a federal court. The notice . . . simply apprises . . . class members of the existence of . . . administrative procedures already . . . available under state law by which they may receive a determination of eligibility for past benefits.

Id. at 346-48.

(Continued from previous page)

Quern supports the decision rendered herein. Next, *Colbeth* noted that the notice would allow plaintiffs to pursue their claims on the state administrative and judicial levels. However, *Quern* rejected this type of reasoning. The Eleventh Amendment was intended to protect against federal judgments requiring payment of money that would interfere with a state's fiscal autonomy.

In this case, defendant argues that *Quern* is inapplicable because in *Quern* mootness was not involved and there was prospective injunctive relief already ordered by the court. Such is thus claimed to be inappropriate here because the issue is moot. The fact that *Quern* did not involve mootness is irrelevant and to limit *Quern* to situations in which the Court has already granted prospective relief would be incorrect. A more logical reading of *Quern* is that ordering a state to bear the administrative costs of notice would not be barred by the Eleventh Amendment "if the notice is ancillary to the grant of *some other appropriate relief* that can be 'noticed.' " *Green v. Mansour, supra,* at 7 (emphasis added.) The fact that *Quern* involved prospective relief does not limit its application. In this case the notice will be ancillary to the grant of some other appropriate relief – the retroactive award of food stamps paid by the federal government.

Defendant also contends that *Green v. Mansour, supra* supports its position. In *Green* changes in federal law rendered moot plaintiff's claim for prospective relief. The remaining claims for declaratory and notice relief related solely to past violations of federal law. In holding that notice relief was barred by the Eleventh Amendment the Court reasoned that notice was not intended "to be an independent form of relief" but must be ancillary to the grant of some other appropriate relief that can be noticed. *id.* at 7. Because there was no continuing violation of federal law to enjoin in *Green,* the Eleventh Amendment barred the notice relief.

In this case, as plaintiff points out, *Green* is not applicable. *Green* involved notice relief for recipients of Aid to Families with Dependent Children (AFDC) benefits not

the food stamp program. AFDC was funded by both state and federal governments while food stamps are wholly funded by the federal government. Thus, the retrospective relief in this case is not barred in that the state's fiscal autonomy is not affected and the notice relief can attach to an appropriate form of relief. Moreover, as plaintiff points out, plaintiff in this case, unlike *Green*, is not asking the Court to make an exception to the Eleventh Amendment, but rather to order the defendant to provide the notice that Congress has required.[10] This would "prospectively require defendant to set up the mechanism to provide the requisite notice to plaintiff." (Pl. Supp. Brief at 9.)

Thus, the Eleventh Amendment does not bar the court from ordering the defendant to notify recipients of the lost benefits and the procedures through which they may determine whether they are eligible.[11]

IV

Defendant argues that she is immune from liability in her individual capacity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court clarified the test for qualified immunity of public officials. To overcome the defense of qualified immunity it must appear

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[10] 7 U.S.C. 2020(c)(ii). *See also* Conf. Rep. 97-377, p.221 (12/9/81) ("that state agencies be required to notify households of known improper denials as soon after discovery as possible and that households be told of the proper form for making a request for restoration of lost benefits.")

[11] Because of this holding the court need not reach plaintiff's contention that Congress abrogated the state's immunity with respect to the adminsitrative costs for restoring lost food stamps.

that the defendant official violated clearly established constitutional or statutory rights of which a reasonable person would have known.

> . . . [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . . Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appopriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an offical could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful . . .

Id. at 818.[12]

Qualified immunity is purely a legal question to be determined by the trial judge prior to trial. *Donta v. Hooper*, 774 F.2d 716 (6th Cir. 1985).

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[12] The *Harlow* test for qualified immunity applies to suits against state officials under § 1983. *Id.* at 818 n.30. "[T]he qualified immunity defense only protects [officials] in [their] individual capacity from money damages, not from other forms of relief sought . . . " *Little John v. Rose*, 768 F.2d 765 (6th Cir. 1985). "An official is not entitled to immunity from actions seeking only injunctive or declaratory relief." *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985).

In the instant case, defendant stated that there is no question that her actions did not violate any clearly established federal statutory or constitutional rights of which a reasonable person would have known. The Court agrees. There is no indication that the federal statutory or constitutional right was clearly established when defendant took the actions as to which plaintiff complains. Moreover, plaintiffs do not raise such a case to show it. Thus, to the extent that plaintiff seeks money damages (but not injunctive or declaratory relief) in her individual capacity, defendant is entitled to qualified immunity.

V

Finally, defendant argues that the Court must dismiss the class claims for lack of jurisdiction. More specifically, defendant contends that because plaintiff's claims are moot and barred by the Eleventh Amendment, the action cannot continue as a class action since a named plaintiff with a current live claim does not exist. However, having held that plaintiff is entitled to retroactive food stamps from the time defendant began the policy of counting supplemental payments in food stamp budgets until that policy was changed to conform to federal regulations, her claims are not moot.

CONCLUSION

Therefore, for the reasons stated, defendant's Motion for Summary Judgment is DENIED except as to the claim for prospective relief which is moot. Plaintiff's Motion is GRANTED, and defendant is HEREBY ORDERED to take administrative steps to restore to plaintiff all food stamps

wrongfully withheld between March 1, 1984 and December 1, 1984 and to provide notice to all class members, to be designated, or a typed designated by the above-mentioned federal regulations. All that remains is the issue of class certification to which the parties are hereby ordered to submit briefs within 30 days.

IT IS SO ORDERED.

Dated: 4/11/86

/s/ Stewart A. Newblatt
STEWART A. NEWBLATT
4/11/86
United States District Judge

APPENDIX B

No. 86-1644

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA COTTON,

Plaintiff-Appellee,

v.

AGNES M. MANSOUR,

Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 1, 1988

Before: ENGEL, Chief Judge;* BOGGS, Circuit Judge, and HOLSCHUH, District Judge.**

ENGEL, Chief Judge. The issue in this appeal is whether the eleventh amendment bars a suit in federal court by a food stamp recipient against the director of the Michigan Department of Social Services (MDSS) to recover food stamp benefits allegedly wrongfully withheld by defendant in violation of federal law. Normally the food stamp program is fully funded by the federal government except that administrative costs are shared

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

**The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

between the federal and state governments. It is by no means certain, however, that liability for the food stamp benefits withheld can be passed on to the federal government and it is to be noted that the United States is not a party to this suit. The program itself is administered by the state.

In May 1984, in response to a Department of Agriculture regulation, 7 C.F.R. § 273.21(j)(1)(vii)(B), MDSS changed its method of counting supplemental Aid to Families with Dependent Children (AFDC) payments in calculating eligibility for food stamps. It began counting retroactive non-recurring lump sum payments, in this case reimbursement for the previous month's rent, as income rather than resources, thus reducing affected person's food stamp benefits. In August 1984, the Deputy of the Food and Nutrition Service branch of the United States Department of Agriculture issued a clarifying memorandum to all the states indicating that these types of payments were to be considered resources rather than income and should not reduce food stamp eligibility. Michigan brought its policy into compliance, but the change did not take effect until December 1984.

Patricia Cotton brought a class action suit in federal court seeking a declaratory judgment that Michigan's policy had been in violation of federal law. She also sought restoration of the withheld food stamps for the period from March until December, and noticed to the affected class of the state administrative remedies available to obtain restoration of similarly withheld food stamps.

The district court found that any claims for prospective relief were moot as Michigan was now in compliance with federal regulations. The court held, however, that Michigan had been in violation of federal law from March until December and ordered Mansour to arrange for restoration of the food stamps to Cotton and to provide notice to other class members. The district court held that the eleventh amendment was not a bar to suit in federal court for restoration of fully federally funded benefits, finding that the state has not shown that the administrative costs involved in the restoration would be effectively burdensome. The court found that notice to the class was allowed under *Green v. Mansour*, 474 U.S. 64 (1985), because it was "ancillary to the grant of some other appropriate relief that can be 'noticed,'" in this case the retroactive award of food stamps paid by the federal government. We reverse.

I.

Plaintiff, Patricia Cotton, was a recipient of both AFDC and food stamps. For Cotton to receive an AFDC grant for shelter, MDSS required that her landlord complete a shelter verification form. In early 1984 plaintiff moved to a new apartment and gave a shelter verification form to her new landlord. The landlord failed to return the shelter verification form to MDSS until March of 1984. Plaintiff's February 1984 AFDC grant did not include an AFDC allowance for shelter.

Eligibility for individual benefits and benefit levels of food stamps are based upon household income. In determining what constitutes a household's income a state

agency must take into consideration numerous exclusions and deductions from income. *See* 7 U.S.C. § 2014(d), (e); 7 C.F.R. § 273.8. Effective May 1, 1984, MDSS began counting all supplemental or corrective public assistance payments as income.

AFDC benefits are included within the definition of public assistance. 7 C.F.R. § 271.2. Prior to May 1, 1984, MDSS had not counted such supplemental payments as income in calculating individual food stamp allotments. The change in MDSS policy was in response to a change in federal regulations relating to treatment of additional or corrective payments in calculating food stamp eligibility.[1] MDSS was required to be in compliance with this new regulation by May 1, 1984.

Plaintiff received a supplemental public assistance payment in May of 1984 to correct the February underpayment. Under the procedure then in effect, MDSS

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[1] In recognition of the change in AFDC, the Department has amended the option for treating AFDC grants prospectively by requiring that the State agency ensure that corrective payments are counted as income. The change is intended to ensure that corrective payments will not go uncounted. The State agency any doubt the corrective payments either prospectively with the basic grant (as income in the issuance month) or retrospectively (as income in the budget month). For example, in a two month system, the State agency may count the corrective payment made in June either prospectively toward the issuance in June, or retrospectively toward the issuance in August. The change will ensure that food stamp allotments reflect household income, yet will allow State agencies flexibility for accounting for corrective payments.

48 Fed.Reg. 54955 (1983). *See also* 7 C.F.R. § 273.21 (j)(1)(viii)(B)(1).

included the supplemental income in its calculation of food stamp allotments which resulted in a reduction of plaintiff's July food stamp award.

In August of 1984, MDSS received a policy memorandum from the Deputy Adminstrator for Family Nutrition Programs, United States Department of Agriculture, regarding the treatment of supplemental payments in calculating food stamp allotments and eligibility. This policy memorandum clarified the interaction between 7 C.F.R. § 273.21(j)(1)(vii)(B) and 7 C.F.R. § 273.9(c)(8), the latter required that certain payments be counted as resources rather than household income.

Effective December 1, 1984, MDSS changed its policy and began treating such corrective payments as nonrecurring lump sum payments which are not included in "income" upon which food stamp eligibility and allotments are based.

On February 15, 1985, plaintiff initiated a class action under 42 U.S.C. § 1983 against defendant, Mansour, personally and in her official capacity as Director of MDSS. Plaintiff sought four forms of relief: (1) injunctive relief; (2) a declaratory judgment that the defendant's method of calculating food stamp benefits between May 1, 1984, and December 1, 1984, had been unlawful; (3) that defendant be ordered to provide plaintiff with the food stamps wrongfully withheld; and (4) that the defendant be ordered to issue notices of underpayment and also be ordered to provide notice of the procedure through which such claimants' eligibility could be determined.

Plaintiff and defendant filed cross motions for summary judgment. The trial court held that defendant Mansour was not personally liable for the actions of MDSS. Plaintiff has not challenged this decision on appeal. The trial court held that food stamps had been unlawfully withheld from Cotton during the period March 1, 1984 to December 1, 1984 and that notice be given to other members of the class. MDSS thereafter filed notice of this appeal. For the reason which follow, we hold that plaintiff's claims for relief are barred by the eleventh amendment.

II.

The eleventh amendment states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of a Foreign State." The Supreme Court has long held that the amendment also applies to suits against a state by one of its own citizens. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

The Supreme Court has also clearly determined that relief under the *Ex Parte Young* exception to the eleventh amendment bar must be prospective in nature.

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the type awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst, supra*, 465 U.S. at 102. See also *Milliken v. Bradley*, 433 U.S. 267. But compensatory or deterrence interests

> are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68.

In the words of the district court, "[P]laintiff requests a declaratory judgment holding that defendant's prior policy of calculation was unlawful, that defendant be ordered to provide plaintiff wrongfully-withheld food stamps and that defendant be ordered to issue notice of underpayment and notice of administrative mechanisms through which claimant's eligibility will be calculated."

1. *Injunctive Relief*

The district court concluded, "To the extent plaintiff seeks . . . any prospective injunctive relief as to defendant's food stamp allotment budget policies that portion of plaintiff's claim[s] should be dismissed as moot." We agree with the district court's conclusion that any request for prospective injunctive relief was moot. MDSS had clearly changed its policy of calculation months before plaintiff had filed suit and MDSS had even personally informed plaintiff's counsel of this change in MDSS policy. There was simply no ongoing violation by MDSS to enjoin.

2. *Food Stamps*

The district court also stated, "Plaintiff's claim for retroactive relief is different," and, "Plaintiff requests retroactive relief in the form of unissued food stamps and that defendant be required to notify class members whose

stamps were wrongfully withheld." In our view the district court's reasoning with respect to these issues, while possessing some appeal, is nonetheless flawed.

In reaching its conclusion that a retroactive award of food stamps in this case would not violate the eleventh amendment the court stated, "[I]t is obvious that states cannot claim relief from a retroactive award of food stamps." It further stated:

> Plaintiff argues that administrative costs associated with notice does not bar plaintiff from receiving retroactive food stamps because these costs are distinguishable from the food stamps and the Eleventh Amendment is not involved. Clearly, the administrative costs are distinguishable from the food stamps. [Cases cited by the district court in support of its interpretation are found in footnote 2]. *See also* 7 U.S.C. § 2020(e)(ii); 7 C.F.R. § 273.17(b). Moreover, the costs of arranging the retroactive payments does not involve the Eleventh Amendment.
>
> Although the United States Supreme Court has not reached the issue directly, other Supreme Court opinions dealing with the general area and lower court opinions dealing with the issue directly, indicate that the costs of arranging retroactive payments, which are themselves paid by the federal government, do not involve the Eleventh Amendment.
>
> Various lower court opinions have held that administrative costs caused by a decision are not within the Eleventh Amendment's immunity for state defendants.[2]

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[2] Lower court opinions upon which the district court based its interpretation were: *Stewart v. Butz*, 356 F.Supp. 1345

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We agree that administrative costs are distinguishable from the stamp themselves. We cannot, however, agree with the district court's conclusion under Supreme

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(W.D. Ky. 1973), *aff'd*, 491 F.2d 165 (6th Cir. 1974), *Carter v. Butz*, 479 F.2d 1084 (3d Cir.), *cert. denied*, 414 U.S. 1103 (1973), *Harrington v. Blum*, 483 F.Supp. 1015 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980), *Collins v. Marshall*, 507 F.Supp. 83 (W.D. Mo.) *reversed on other grounds, sub nom., Collins v. Donovan*, 661 F.2d 705 (8th Cir. 1981). All of the cases listed in support of the district court's conclusion are easily distinguished from the case at hand.

Stewart v. Butz and *Carter v. Butz are different from this in several respects. First, both Stewart* and *Carter* involved situations where the Secretary of Agriculture was a named defendant. In Cotton's case the only defendant is Mansour. In *Stewart* the district court was confronted with a situation where Stewart had been denied the right to purchase food stamps for a month because she allegedly purchased food stamps exceeding her quota for the previous month. It was determined that the state made an administrative error. The court determined that the federal government was to pay for the stamps wrongfully withheld. The court rejected the federal government's attempt to categorize the retroactive award of stamps as an administrative expense, nothing among other things the eleventh amendment problems with such a retroactive award. The district court dismissed the complaint against the Commonwealth of Kentucky and awarded relief against the federal government in the form of reducing the price of food stamp coupons in future months until Stewart had been fully compensated.

In our opinion in *Stewart v. Butz*, 491 F.2d 165 (6th Cir. 1974) (per curiam), the only issue on appeal was whether the Secretary of Agriculture or the Commonwealth of Kentucky had to pay for the stamps as there was no dispute that Stewart

(Continued on following page)

Court and lower court precedent that, "the costs of arranging retroactive payments which themselves are paid by the federal government, do not involve the Eleventh Amendment." From the remainder of the district court's opinion, it is apparent that the district court held that if the stamps themselves were paid by the federal

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had been wrongfully denied those stamps. We "affirmed [the judgment of the district court] insofar as it adjudged liability against the Secretary of Agriculture." *Id.* at 166. If anything, *Stewart* supports defendant's claim to eleventh amendment immunity.

Again, in *Carter*, "[t]he only issue [was], as between the federal and state governments, which partly was responsible for the remedy implied from conceded statutory eligibility [to purchase food stamps]." *Id.* at 108. As between the state and federal defendants, the Third Circuit held that the federal government should pay for the stamps because:

(1) there was no *additional* expense to the federal government because if there had been no error, the federal government would have dispersed these benefits anyway;

(2) the federal government had appropriated money for the program: the states had not appropriated money and had not conditioned their participation upon waiver of sovereign immunity; and

(3) that the district court's forward adjustment award was consistent with the nutritional purpose of the program.

Harrington, which held that a state could be held liable for a retroactive award of food stamps was effectively reversed by the Supreme Court opinion in *Green*. *See Green*, 474 U.S. at 71. Finally, *Collins*, reversed by the Eighth Circuit, involved a different statutory scheme and the relief granted was prospective in nature.

government, the state could not claim eleventh amendment protection solely related to its administrative burden. We find this interpretation inconsistent with Supreme Court precedent.

As previously stated, the *Ex Parte Young* exception is narrow and forward in its focus. Here the relief sought is solely retroactive and would impose direct administrative expenses on the State Treasury.

> [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and to hold state officials responsible to "the supreme authority of the United States." *Young, supra,* at 160. As JUSTICE BRENNAN has observed, "*Ex Parte Young* was the culmination of efforts by this Court to Harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution. *Perez V. Ledesma,* 401 U.S. 82, 106 (1970). . . .
>
> The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan, supra.* We recognized that the prospective relief authorized by *Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." 451 U.S., at 664. *But we declined to extend the fiction of* Young *to encompass retrospective relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we conclude that although the difference between permissible and impermissible relief "will not in many instances be that between day and night,"* 415 U.S. at 667, an award of retractive relief necessarily "'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.'" *Id.,* at 665 (quoting *Rothstein v. Wyman,* 467

> F.2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert. denied, 411 U.S. 921 (1973)). In sum, *Edelman's* distinction between prospective relief and retroactive relief fulfills the underlying purpose of *Ex Parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 105-06 (1984) (emphasis added).

A good illustration of why the district court in this case was in error is found in *Colbeth v. Wilson*, 554 F.Supp. 539 (D. Vt. 1982), *aff'd sub nom., Colbeth v. O'Rourke*, 707 F.2d 57 (2d Cir. 1983). In *Colbeth*, Colbeth on behalf of herself and others similarly situated sought declaratory and injunctive relief against David Wilson in his official capacity as Commissioner of the Vermont Department of Social Welfare (DSW). Colbeth claimed that Wilson's "interpretation and implementation of the Vermont Food Stamp Manual violate[d] her rights under the Food Stamp Act of 1964, as amended, 7 U.S.C §§ 2011-2029 (1976 & Supp. IV 1980) its accompanying regulations, and the Fourteenth Amendment to the United States Constitution." *Id.* at 540. Colbeth filed an application for food stamp benefits with the DSW. Later that month, DSW issues notice of its decision denying the application of the ground that plaintiff's income was in excess of DSW standards. Factored into the computation of plaintiff's income for purposes of determining her eligibility for food stamp benefits was a figure respecting her monthly AFDC grant. In calculating plaintiff's income DSW included the full amount of plaintiff's AFDC grant without excluding therefrom any amount representing the child care and transportation expenses by which the

AFDC grant had been increased. Plaintiff argued that "the employment expense deductions mandated by the AFDC statute, which serve to increase an AFDC grant to compensate recipients for such expenses, are 'reimbursements' and therefore should be excluded from consideration as income for purposes of determining food stamp eligibility." *Id.* at 542-43. Wilson conceded that plaintiff would have been eligible for a food stamp allotment if the amount by which Colbeth's AFDC grant was augmented had been considered as an exclusion from income for purposes of the food stamp program. *Id.* at 542.

After Colbeth filed her complaint, Congress amended the Food Stamp Act such that household income excluded "'reimbursements which do not exceed expenses actually incurred and which do not represent a gain or benefit to the household: *Provided that no portion of benefits provided under Title IV-A of the Social Security Act, to the extent it is attributable to an adjustment for work-related or child care expenses shall be considered such reimbursement* . . . .' 7 U.S.C.A. § 2014(d)(5) (West Supp. 1982) (emphasis added). Title IV-A of the Social Security Act is the Aid to Families with Dependent Children (AFDC) section of the Act which appears at 42 U.S.C.A §§ 601-615 (West 1974 & Supp. 1982)." *Colbeth*, at 542.

In light of the above amendment, Colbeth withdrew her claim for prospective relief. Plaintiff requested the district court recalculate her eligibility for, and make restitution of, benefits due and owing the class prior to the effective date of the amendment or in the alternative

that the court direct the defendant to issue to class members *Quern*-type notice.[3]

The district court concluded,

> [Plaintiff's request for recalculation and restitution of food stamp benefits falls on the *Edelman* rather that the *Ex Parte Young* side of the Eleventh Amendment law. . . .Defendant's projections as to the magnitude of administrative expenses associated with the grant of retroactive relief indicate that such an award may demonstrably and significantly interfere with the State's budgetary process and thus its fiscal autonomy.
>
> Finally, we are not persuaded that the equities ultimately lie in favor of a retroactive award. Presumably, the State has a definable allocation of monies to be used in the payment of public aid benefits. An award of retroactive benefits that result in liability of the State for administrative expenses will reduce the availability of funds for the continuing obligations of public assistance programs. . . .The purpose of the food stamp program is to enable families to obtain a nutritionally adequate diet. As a practical matter, that goal may not be fulfilled retroactively. Therefore, an award of relief for past errors would be compensatory rather than remedial in nature. Policy considerations strongly suggest that the distribution of limited resources to those presently in need of food stamp assistance better serves the purpose of the Act than an award to persons whose circumstances may have been improved in this interim period.

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[3] This type of notice is discussed in greater detail in section 3 *infra*.

For the same reasons the Court in *Colbeth* found the plaintiff's claim barred by the eleventh amendment, we also find that Cotton's claim for a retroactive award of food stamps is barred.

3. *Notice Relief*

With respect to plaintiff's claim for notice relief, to the extent that it is not otherwise moot by our rulings here today, we conclude that it is in all events indistinguishable from *Green v. Mansour*, 474 U.S. 64 (1985), and hence barred by the eleventh amendment. In granting notice relief, the district court concluded that *Quern v. Jordan*, 440 U.S. 332 (1979), was not limited to situations where notice was ancillary to some form of prospective relief.

We have previously held that the retroactive award of food stamps in this case was barred by the eleventh amendment. There is therefore no other appropriate prospective relief to which notice relief could be ancillary. The district court misinterpreted the type of notice relief allowed under *Quern v. Jordan* and *Green v. Mansour*. In *Quern*, the Supreme Court upheld a court order requiring the state defendants to send notice to class members advising them that there was a state administrative procedure available them that there was a state administrative procedure available if they desired to have the state determine whether they were eligible for past benefits. The Court upheld the notice, finding it was more properly viewed as ancillary to the prospective relief already ordered by the Court, the prospective relief being the permanent injunction against state officials continuing to

violate federal law. The state's administration of the federal-state program for Aid to the Aged, Blind or Disabled violated federal regulations then in effect.

In *Green*, the Supreme Court carefully reviewed its previous opinion in *Quern*[4] and held that *Quern*-type

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[4] In *Green*, two separate class actions were filed against MDSS claiming that MDSS's policies and regulations violated 42 U.S.C. § 1983 by inflating respective class members' earned income and thereby causing a reduction or termination of AFDC benefits contrary to the applicable federal law. Class one challenged MDSS's policy of prohibiting the deduction of child care costs in the calculation of earned income. Class two challenged the MDSS's policy of automatically including stepparent's income in the calculation of earned income. The earned income figure is crucial in that it is used for determining eligibility for and the amount of food stamps. While the claims of both classes were pending, Congress amended the relevant portions of the AFDC program requiring participating states to: (1) deduct child care expenses up to a specified amount from earned income; and (2) include stepparent income in the calculation of earned income. Neither class claimed that the policy MDSS was using at the time if trial violated federal law. Both classes nevertheless claimed that they were entitled to have the district court award them both the "notice relief" and a declaration that MDSS's prior conduct violated federal law.

The district court granted MDSS's motions to dismiss, holding that in each case changes in federal law rendered moot the claims for prospective relief and that the remaining claims for declaratory and notice relief related solely to past violations of federal law. The district court determined such retroactive relief was barred by the eleventh amendment. We affirmed the district court's decisions upon consolidated appeal in *Banas v. Dempsey*, 742 F.2d 277 (6th Cir. 1984). The Supreme Court, in turn, affirmed our decision in its decision in *Green*, 474 U.S. 64 (1985).

notice was only available in ancillary to some form of *prospective* relief.

> The notice in *Quern v. Jordan* did nothing other than inform a diverse and partially victorious class concerning the extent of the judgment in its favor, cf. Fed. Rule Civ. Proc. 23(d)(2) and that the federal courts could do no more for them. There was no suggestion that the notice itself would bind state officials in any way, or that such notice would be routinely available as a form of relief in other cases. *Because "notice relief" is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation in the Art. III power of federal courts prevents them from ordering it as an independent form of relief.*
>
> Measured by the standards of Quern, however, *a request for a limited notice order will escape the Eleventh Amendment bar if the notice is ancillary to the grant of some other appropriate relief that can be "noticed." Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available. Therefore, notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief.*

Green, 474 U.S. at 71 (emphasis added).

We find this case indistinguishable from *Green* and conclude that the "notice relief" requested is barred by the eleventh amendment.

4. *Declaratory Judgment*

As in *Green*, plaintiffs have also requested declaratory relief. In *Green* the Supreme Court noted that "notice relief" could be available if plaintiffs were entitled to a declaratory judgment that the defendant violated federal law in the past. The court in *Green* then went on to

examine the circumstances under which an issuance of a declaratory judgment would be appropriate.

> The Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought, and we have held that under this Act declaratory relief may be available even though an injunction is not. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). But we have also held that the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 241 (1952). The propriety of issuing a declaratory judgment may depend upon equitable considerations, see *Samuels v. Mackell*, 401 U.S. 66, 73 (1971), and is also "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff, supra*, at 243 cf. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). . . .
>
> We think that these cases demonstrate the impropriety of the issuance of a declaratory judgment in this case.[5] *There is no claimed continuing violation of*

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[5] *See Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943) (declaratory judgment not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statue prohibited federal courts only from issuing injunctions against such taxes); *Samuals v. Mackell*, 401 U.S. 66 (1971) (declaratory judgment not available to declare a state criminal statute unconstitutional where it would have much the same effect as an injunction prohibiting enforcement of the statute); *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) (declaratory judgment inappropriate for determining whether the plaintiff's business was interstate commerce and therefore potentially immune from state regulation).

> *federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future. Cf.* Steffel v. Thompson, supra, 415 U.S. at 454, 94 S. Ct., at 1218. *There is a dispute about the lawfulness of respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of petitioners. We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the later kinds of relief being of course prohibited by the Eleventh Amendment.* The teachings of *Huffman, Samuels,* and *Wycoff,* are that a declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman v. Jordan,* 415 U.S. 651 (1974).

Green, 474 U.S. at 72-73 (emphasis added). We find that plaintiff's request for declaratory judgment is indistinguishable from the request rejected by the Supreme Court in *Green*. We therefore reject plaintiff's request for a declaratory judgment that defendant's past method of calculating food stamp eligibility between May 1, 1984 and December 1, 1984 was unlawful.

CONCLUSION

Because the relief ordered by the district court against the defendant was retroactive, would require expenditures from the State treasury, contained no prospective relief requested by plaintiff and granted by the

district court is barred by the eleventh amendment. Accordingly, we REVERSE and REMAND with instructions that the district court dismiss the plaintiff's case.

APPENDIX C

No. 86-1644

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA COTTON,

Plaintiff-Appellee,

v.

AGNES M. MANSOUR,

Defendant-Appellant.

O R D E R

(Filed March 20, 1989)

Before: ENGEL, Chief Judge; BOGGS, Circuit Judge, and HOLSCHUH, District Judge.*

No judge in the active service of this court having requested a vote for rehearing en banc, the petition of appellee Cotton for rehearing has been referred to the original panel.

Upon consideration the panel has concluded that its original opinion should stand as written notwithstanding appellee's insistence that the enactment of 7 U.S.C. § 2020(e)(11) indicates a congressional intent to create a private right of action against the state.

Although the Food Stamp Act requires that a state plan of operation provide for the restoration by the state agency of benefits that have been wrongfully denied, we

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* Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

reaffirm our belief that a retroactive award of food stamps by the federal court would be prohibited by the Eleventh Amendment. The notice provision in 7 C.F.R. § 273.17 simply implements the statutory provision for the restoration of past due benefits by requiring the state agency to notify the recipient of the amount of benefits being restored by the state agency and the right to appeal any aspect of the proposed lost benefit restoration. 7 U.S.C. § 2020(e)(11). We are not persuaded that Congress, in the enactment of the Food Stamp Act, expressed an intention to abrogate the Eleventh Amendment in unmistakable language in the Act itself, nor has the state of Michigan, by its participation in the food stamp program and its adoption of a plan of operation, specifically waived its immunity to suit in federal court. *Atascadero State Hospital v. Scanlon,* 473 U.S. 284 (1984). Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ Illegible
Clerk

APPENDIX D

REGULATIONS INVOLVED

7 C.F.R. 273.17(a), (b), (c)

(a) *Entitlement.* (1) The State agency shall restore to households benefits which were lost whenever the loss was caused by an error by the State agency or by an administrative disqualification for intentional Program violation which was subsequently reversed as specified in paragraph (e) of this section, or if there is a statement elsewhere in the regulations specifically stating that the household is entitled to restoration of lost benefits. Benefits shall be restored for not more than twelve months prior to whichever of the following occurred first;

(i) The date the State agency receives a request for restoration from a household; or

(ii) The date the State agency is notified or otherwise discovers that a loss to a household has occurred.

* * *

(b) *Errors discovered by the State agency.* If the State agency determines that a loss of benefits has occurred, and the household is entitled to restoration of those benefits, the State agency shall automatically take action to restore any benefits that were lost. No action by the household is necessary. However, benefits shall not be restored if the benefits were lost more than 12 months prior to the month the loss was discovered by the State agency in the normal course of business, or were lost more than 12 months prior to the month the State agency was notified in writing or orally of a possible loss to a specific household. The State agency shall notify the household of its entitlement, the amount of benefits to be

restored, any offsetting that was done, the method of restoration, and the right to appeal through the fair hearing process if the household disagreed with any aspect of the proposed lost benefit restoration.

(c) *Disputed benefits.* (1) If the State agency determines that a household is entitled to restoration of lost benefits, but the household does not agree with the amount to be restored as calculated by the State agency or any other action taken by the State agency to restore lost benefits, the household may request a fair hearing with 90 days of the date the household is notified of its entitlement to restoration of lost benefits. If a fair hearing is requested prior to or during the time lost benefits are being restored, the household shall receive the lost benefits as determined by the State agency pending the results of the fair hearing. If the fair hearing decision is favorable to the household, the State agency shall restore the lost benefits in accordance with that decision.

(2) If a household believes it is entitled to restoration of lost benefits but the State agency, after reviewing the case file, does not agree, the household has 90 days from the date of the State agency determination to request a fair hearing. The State agency shall restore lost benefits to the household only if the fair hearing decision is favorable to the household. Benefits lost more that 12 months prior to the date the State agency was initially informed of the household's possible entitlement to lost benefits shall not be restored.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICIA COTTON, on behalf of herself and all other persons similarly situated,

Plaintiff,

v.

AGNES M. MANSOUR, personally and in her official capacity as Director of the Michigan DEPARTMENT OF SOCIAL SERVICES,

Defendants.

_____/

Case No. 85-CV-40068-FL

JUDGE STEWART A. NEWBLATT

STIPULATION AND ORDER FOR CLASS CERTIFICATION

The parties to this action stipulate through their undersigned counsel to certify this action as a class pursuant to Federal Rules of Civil Procedure 23(b)(2).

The parties stipulate that the class shall be defined as follows:

> All persons receiving public assistance in the form of Aid to Families with Dependent Children (AFDC) and General Assistance (GA) between May 1, 1984 and November 30, 1984, whose food stamp allotments were decreased due to the receipt of AFDC and GA supplemental assistance warrants between March 1, 1984 and November 30, 1984, to provide for needs in a month prior to the month when the supplemental payment was received.

For Plaintiffs:

Dated: 5/28/84 /s/ Terri L. Stangl
TERRI L. STANGL (P 35257)
Attorney for Plaintiff
LEGAL SERVICES OF EASTERN MICHIGAN
224 North Warren Avenue
Saginaw, MI 48607
(517) 755-4465

For Defendant:

Dated: 6/12/86 /s/ Christopher Dobyns
CHRISTOPHER DOBYNS
Assistant Attorney General
512 Commerce Center
Lansing, MI 48913

ORDER

IT IS HEREBY ORDERED that this matter shall be certified as a class on behalf of all persons described in the above stipulation.

Entered: 6/17/86 STEWART A. NEWBLATT
U.S. DISTRICT JUDGE

STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

A TRUE COPY CLERK U. S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

BY Illegible
DEPUTY CLERK

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICIA COTTON, on behalf of herself and all other persons similarly situated,

Plaintiff,

v.

AGNES M. MANSOUR, personally and in her official capacity as Director of the MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Defendant.

CIVIL ACTION
No. 86-40068

JUDGMENT

(Filed July 30, 1986)

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered;

It Is Ordered and Adjudged that judgment be entered for the plaintiff and defendant is ordered to take administrative steps to restore to plaintiff all food stamps wrongfully withheld between March 1, 1984 and December 1,

1984 and to provide notice to all class members, to be designated, or a type designated by federal regulations.

Dated: July 29, 1986

ROBERT A. MOSSING, CLERK

BY: Ruth A. Jozwiak
Ruth A. Jozwiak, Deputy Clerk